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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ABIGAY GONZALES et al., Plaintiffs, Cross-defendants and Appellants, v. WESTERN MUTUAL INSURANCE COMPANY, Defendant, Cross-complainant and Respondent.	D044000 (Super. Ct. No. 801844)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Reversed.

Abigay Gonzales and Maria Castelo (plaintiffs) sued their property insurance carrier, Western Mutual Insurance Company (Western), alleging Western wrongfully denied coverage for the cost of removing asbestos from their home that had been damaged by a fire. The court granted summary judgment, finding no coverage as a matter of law based on a pollution exclusion in Western's policy. We reverse the

judgment, determining the pollution exclusion is inapplicable under the terms of the insurance policy.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs purchased a homeowners' insurance policy from Western. A fire thereafter occurred on the property, substantially damaging the home. Western accepted coverage for the loss, but refused to pay for expenses to remove the asbestos that became exposed because of the fire. Gonzales sued Western, alleging breach of contract and seeking coverage for the cost to remove the asbestos.[1] Western cross-complained for declaratory relief.

The parties filed cross-summary judgment motions on the following stipulated facts. "[A] fire occurred to [plaintiffs'] residence . . . . [¶] As a result of the fire and its consequent suppression, the ceilings containing asbestos became friable and exposed and asbestos abatement was required for repair of the residence. [¶] Plaintiffs claim that [Western] is required to pay for the cost to abate asbestos in the real property caused by fire, while [Western] contends that asbestos abatement is specifically excluded pursuant to the terms of its policy regardless of the cause or event causing the need for asbestos abatement pursuant to the terms of the . . . policy."

The only evidence presented was a copy of plaintiffs' insurance policy. The policy is an all-risk policy, providing coverage for "accidental direct physical loss to [covered]

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1 Plaintiffs also initially asserted a bad faith claim, but later dismissed that cause of action.

property . . . except: . . . ." The policy then contains a long list of exceptions. The first exception is "losses excluded under *Section 1 - Exclusions*." The "*Section 1 - Exclusions*" section in turn provides: "We do not insure for loss *caused directly or indirectly by any of the following*. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." (Italics added.) This section then lists 10 specific perils that are excluded, the ninth being a pollution exclusion that states: "*Pollution. All loss, damages, costs and/or expenses arising out of or caused by pollution, and all costs and/or expenses incurred by you to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. Pollutants means any solid, liquid, gaseous or thermal irritant or contamination, including but not limited to vapor, fumes, acids, alkalis, chemicals, asbestos and waste. Waste includes but is not limited to material to be recycled, reconditioned or reclaimed*." (Italics added.)

In its summary judgment papers, Western argued this pollution exclusion (Paragraph 9) applied to exclude the claimed asbestos removal costs. Plaintiffs countered that the asbestos removal costs were covered under concurrent causation insurance principles because the asbestos removal was made necessary because of the fire and the fire was a covered peril under the policy. (See *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 404-408.) Western responded that concurrent causation concepts were inapplicable because it was undisputed that the fire was the sole cause of the claimed loss (the asbestos removal), and thus Western was entitled to enforce its pollution exclusion provision as to the excluded losses resulting from this covered peril.

After considering the parties' arguments, the court agreed with Western that concurrent causation principles are inapplicable because "there is no dispute as to the cause of the loss—a fire." The court then found the pollution exclusion provision applied to exclude the cost of asbestos abatement, stating that an insurer "'has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected.' [Citation]." The court thus granted summary judgment in Western's favor.

DISCUSSION

I. *Generally Applicable Legal Principles*

The interpretation of an insurance policy is a legal question reviewed de novo under well-settled contract interpretation rules. (*E.M.M.I., Inc. v. Zurich American Ins. Co*. (2004) 32 Cal.4th 465, 470 (*E.M.M.I.*); *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) The "'fundamental'" rule is that the interpretation "'must give effect to the "mutual intention" of the parties.'" (*E.M.M.I., supra,* 32 Cal.4th at p. 470.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*Ibid*.) Judicial interpretation is governed by the "'clear and explicit'" meaning of these provisions, interpreted in their "'ordinary and popular sense,'" unless common usage gives the words a technical or special meaning. (*Ibid*.)

If a policy provision is susceptible to two or more reasonable constructions, the ambiguity """'is resolved by interpreting the ambiguous provisions in the sense the [insurer] believed the [insured] understood them at the time of formation. [Citation.] If application of this rule does not eliminate the ambiguity, ambiguous language is

construed against the party who caused the uncertainty to exist. [Citation.]' 'This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, "the objectively reasonable expectations of the insured."'" [Citation.] "Any ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations."'" (*E.M.M.I.*, *supra*, 32 Cal.4th at p. 470.)

Plaintiffs' first party insurance policy was an all-risk policy, meaning that the insurer covered all risks except for excluded perils. (See *Fire Insurance Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 465, fn. 13.) Under this type of policy, the insurer bears the burden of proving the loss was caused by an exclusion. (*Garvey v. State Farm Fire & Casualty Co., supra,* 48 Cal.3d at p. 406.) In determining whether the insurer has met this burden, a court must "strictly construe[ ]" the policy exclusions. (*E.M.M.I.*, *supra*, 32 Cal.4th at p. 471.) "'"[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. '[A]ny exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.' [Citation.] Thus, 'the burden rests upon the insurer to phrase . . . exclusions in clear and unmistakable language.' [Citation.] The exclusionary clause 'must be *conspicuous, plain and clear.*'" [Citation.] This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.'" (*E.M.M.I.*, *supra*, 32 Cal.4th at p. 471.)

II. *Analysis*

Plaintiffs' primary appellate argument is that Western's reliance on the insurance policy's pollution exclusion to deny coverage violates concurrent causation principles because those principles provide that "[w]hen a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131.) Western does not dispute that the fire was the efficient proximate cause of the claimed loss (the asbestos removal), but argues that concurrent causation concepts are irrelevant because the fire was the sole cause of the claimed damages.

Western is correct on this point. Because the parties agree that there is a single cause of the claimed loss (the fire), the legal issue as to whether a loss resulted from a covered or uncovered cause is not before us. But the fact there was only one cause of the claimed loss does not mean that the asbestos damage is therefore necessarily excluded under plaintiffs' policy. Although insurers may legally exclude damages caused by covered perils, the first step in determining whether the damage has been excluded is to examine the policy language to determine whether the claimed exclusion is applicable. (*Waller v. Truck Insurance Exchange, Inc. supra,* 11 Cal.4th at p. 18.) Thus, contrary to Western's appellate assertions, the threshold issue here is not whether Western *may* legally exclude the cost of removing asbestos. Instead, the issue is whether the exclusionary provision relied upon by Western in fact excludes the claimed losses. We thus turn to analyze this issue.

To satisfy its burden to prove the claimed loss was excluded from coverage, Western relied on the "Section 1 - Exclusions" section of the policy to show there was no coverage for the cost of removing the "friable and exposed" asbestos. The opening sentence of that section states that the policy excludes "loss *caused* directly or indirectly *by*" various enumerated perils, including earth movement, power failure, war, intentional loss, and *pollution (defined to include asbestos)*. (Italics added.) The next sentence states that "[s]uch loss is excluded regardless of any other cause or event contributing . . . to the loss." These two sentences make clear that the section is intended to provide a list of *causes* (perils) for which any resulting losses would not be covered. By its explicit terms, the "Section 1 - Exclusions" reflect excluded causes, rather than excluded items of damage.

Based on this policy language, Western's reliance on the pollution exclusion (Paragraph 9) to deny coverage is misplaced. In the proceedings below, Western admitted that the claimed loss (the cost of removing the asbestos) was an item of damage and was *not caused by* pollution. On appeal, Western reiterates its position that the asbestos removal costs constituted a *loss or damage* rather than *a proximate cause of* the claimed damage. Thus, under the plain language of the policy, the pollution exclusion is inapplicable because it applies only to damages caused by pollution, and in this case Western admits pollution did not *cause* the claimed damage.

We recognize that Paragraph 9 of the "Section 1 - Exclusions" (the pollution exclusion) refers to pollution both as a cause and as a damage and thus can be read to exclude both forms of pollution. However, Paragraph 9 must be read in conjunction with

the introductory paragraph of the section in which it is contained. (See *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1785; accord, Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part"].) Reading Paragraph 9 with the introductory paragraph, the only reasonable interpretation is that the purpose of the pollution exclusion was to exclude losses caused by pollution from the all-risk policy, and not to exclude particular items of *damage* that can be characterized as pollution.

Moreover, to the extent there is any inconsistency between the introductory sentence of the "Section 1 - Exclusions" section and the language of Paragraph 9, the resulting ambiguity must be resolved by interpreting the policy terms in the sense the insurer believed the insured objectively understood them, and any remaining ambiguity must be construed against the insurer. (*E.M.M.I., supra,* 32 Cal.4th at p. 470.) Viewing the policy as a whole, an insured would have reasonably understood that the pollution exclusion contained in the "Section 1 - Exclusions" portion of the policy would not exclude *damage*s caused by a fire, and instead would exclude only those damages *caused by* pollution, as that term is defined in the policy. Thus, for example, if the asbestos particles had disseminated and caused property damage to plaintiffs' home (and this was the efficient proximate cause of the damage), an insured would reasonably understand that there was no coverage of this damage because the damage was caused by an excluded peril (pollution). (See *J & S Enterprises v. Continental Cas.* (Colo.App. 1991) 825 P.2d 1020, 1021-1023.) Here, however, there is no allegation—and Western admits—that the asbestos was not the proximate cause of any damage for which the

insureds are seeking coverage. As Western asserts, this case presents "a situation where the parties agree that the efficient proximate cause of a loss is a covered peril (i.e. fire), but a party seeks to exclude a particular *item of damage* based on" the policy language. (Italics added.)

Because Western concedes the claimed damage was caused by a covered peril (a fire) and Western has not directed us to any language in the policy excluding the type of *damage* that occurred here, the court erred in granting summary judgment in Western's favor. In reaching this conclusion, we agree with Western that an insurer may generally limit the type of losses or damages that its policy will cover, even if those losses result from a covered peril. If this limitation is accomplished in a clear and unambiguous fashion, the exclusion for a particular type of damage is enforceable. (See *Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414.) For example, plaintiffs' policy contains a section listing the types of property that are not covered, including aircraft, animals, vehicles, and certain business property. These items are excluded from coverage even if damage to the items is caused by a covered peril. But in this case, there is no provision in the policy excluding asbestos damage that is caused by a covered peril (fire). Instead, the only potentially applicable exclusion provision is a provision that excludes damage *caused by pollution*.

The decisions relied upon by Western are distinguishable because in each of those cases the insured was seeking coverage for damages caused by *a risk that was expressly excluded from the policy*. For example, in *Finn v. Continental Ins. Co.* (1990) 218 Cal.App.3d 69, one of the exclusions stated that the policy did not cover loss caused by a

plumbing system's "continuous or repeated seepage or leakage of water." (*Id*. at p. 71.) The insured made a claim after she discovered leaking water from a broken sewer pipe had damaged her property. (*Ibid*.) In attempting to avoid the water leakage exclusion, the insured argued that there was a sudden break in the pipe, and this cause of damage was covered. (*Id*. at pp. 71-72.) The court rejected this argument, finding that because a broken pipe was not conceptually distinct from a leaking pipe, the case "involved not multiple causes but only one, a leaking pipe." (*Id*. at p. 72.) Thus, in *Finn*, unlike here, the sole cause of the loss was an excluded peril.

In *J & S Enterprises v. Continental Cas.*, *supra*, 825 P.2d 1020, the court likewise held that losses from an *excluded cause* were not covered. In that case, asbestos particles were "scattered into various parts" of a shopping mall during a ceiling renovation. (*Id*. at p. 1021.) The insured, who owned business property in the mall, lost income and suffered property damage from the asbestos release. (*Id*. at pp. 1021-1022.) The court held the insured's claimed income and property loss were not covered because the policy specifically excluded losses caused by "contamination," and that the "intermixing of asbestos particles" throughout the mall constitutes "contamination" within the meaning of the policy. (*Ibid*.) Thus, unlike here, in *J & S Enterprises* it was undisputed that the cause of the property damage and income loss was the asbestos release.[2]

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2 Plaintiffs' insurance policy also contains an exclusion for "release, discharge or dispersal of contaminants or pollutants," but Western has never argued this exclusion applies here, presumably because there is no claim that the asbestos was released, discharged, or dispersed.

Moreover, to the extent Western now attempts to argue that the exposed asbestos in this case *caused* property damage and therefore it falls within the Paragraph 9 pollution exclusion, then this exclusion would not preclude coverage under concurrent causation analysis. Under concurrent causation first-party insurance principles, when a loss is caused by a combination of a covered peril (fire) and specifically excluded risks (pollution), the loss is covered if the covered risk was the "efficient proximate cause of the loss." (*State Farm Fire & Casualty Co. v. Von Der Lieth, supra,* 54 Cal.3d at p. 1131.) The question whether a peril was the efficient proximate cause is frequently a factual issue, but in this case Western has admitted that the fire was the efficient proximate cause of the claimed loss (the asbestos removal costs). Although Western's policy contains a provision purporting to exclude coverage for losses caused when at least one cause is excluded by the policy, several courts have held this type of provision is unenforceable (see *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal.App.4th 645, 651; *Howell v. State Farm Fire & Casualty Co.* (1990) 218 Cal.App.3d 1446, 1452-1458), and Western has not specifically sought to enforce this provision in this case.

DISPOSITION

Judgment reversed. Western to pay plaintiffs' costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.